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BEFORE THE PUBLIC UTILITY COMMISSION**

OF OREGON

ARB 509(4)

In the Matter of)	
)	
NORTHWEST OPEN ACCESS NETWORK)	
OREGON and QWEST CORPORATION)	ORDER
)	
Fourth Amendment to Interconnection)	
Agreement Submitted for Commission)	
Approval Pursuant to Section 252(e) of the)	
Telecommunications Act of 1996.)	

DISPOSITION: AMENDMENT MOOT; SUPPLEMENTAL APPLICATION REJECTED

On May 6, 2004, Northwest Open Access Network Oregon (NW Open Access) and Qwest Corporation (Qwest) filed a fourth amendment to the interconnection agreement previously approved by the Public Utility Commission by Order No. 03-670. The parties seek approval of the amendment under Section 252(e) of the Telecommunications Act of 1996. The Commission provided notice by posting an electronic copy of the agreement and amendment on the World Wide Web, at: <http://www.puc.state.or.us/caragmnt/>. Only the Commission Staff (Staff) filed comments.

Under the Act, the Commission must approve or reject an agreement reached through voluntary negotiation within 90 days of filing. The Commission may reject an agreement only if it finds that:

- (1) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (2) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

NW Open Access and Qwest seek approval of an amendment that details a limited time promotion offered by Qwest to competitive carriers. The amendment specifies that the promotion is limited to a three-month period, from January 1, 2004, through March 31, 2004.

DISCUSSION AND OPINION

In its comments, Staff concluded that, on its face, the amendment does not appear to discriminate against telecommunications carriers who are not parties to the agreement and does not appear to be inconsistent with the public interest, convenience, and necessity. However, Staff expressed concern that, given the fact that NW Open Access and Qwest submitted the amendment for approval on May 6, 2004, the terms of the three-month promotion have come and gone before the Commission could approve or disapprove of the filing.

We share Staff's concerns. On numerous occasions, we have cautioned carriers to file agreements and amendments prior to the stated effective date and well before the termination date. Otherwise, the carriers would be operating under the negotiated terms without Commission approval. Such conduct could be discriminatory if no other carriers had access to the unapproved agreement or amendment. Due to this concern, the Commission may seek penalties against carriers who fail to timely submit negotiated terms for approval.

In this case, our concerns about discrimination are mitigated by the fact that Qwest broadly offered the promotional discount to all competitive local exchange carriers. Moreover, the Commission has approved similar amendments between Qwest and other carriers. *See e.g.*, Order No. 04-140 (ARB 451(3)), Order No. 04-137 (ARB 509(2)) and Order No. 04-136 (ARB 401(3)). Nonetheless, our concerns remain about the late filing of the amendment for approval. As we have noted on numerous occasions, an interconnection agreement or amendment thereto has no effect or force until approved by a state Commission. *See* 47 U.S.C. Sections 252 (a) and (e). Accordingly, negotiating carriers must take steps to ensure that agreements and amendments are filed promptly after execution.

The prompt filing requirement is even more critical when an amendment implements the terms of a promotional offering. In such cases, negotiating carriers should consider seeking Commission approval prior to the proposed promotional date. With expedited processing, the Commission should be able to preapprove such promotional offerings if filed 45 days prior to the proposed effective date. The Commission may approve an agreement filed during the term of a promotional offer; however, carriers should be aware that any transactions made pursuant to the agreement that occurred prior to the date of Commission approval would be unenforceable.

While we have prospectively approved other agreements or amendments that were not promptly filed, the negotiated terms in this docket have expired prior to Commission action. Under such circumstances, we conclude that the approval of this amendment is not consistent with the public interest, convenience, and necessity. Accordingly, we conclude that the carrier's filing has been rendered moot and should be rejected. The carrier's late filing has precluded the Commission from taking action. Under the circumstances, the negotiated agreement between the parties is unenforceable.

CONCLUSIONS

The negotiated terms submitted for Commission approval have expired. Accordingly, approval of the filing is not consistent with the public interest, convenience, and necessity.

ORDER

IT IS ORDERED that the amendment to the previously approved agreement, submitted for Commission approval by Northwest Open Access Network Oregon and Qwest Corporation, is rejected.

Made, entered, and effective _____.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.